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No. 98-0504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VICTOR TORRES, ET AL.,
Petitioners,

v.

COMMISSIONER OF CORRECTION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 4, 1998

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In their opposition to the petition for certiorari, the respondents misrepresent the procedural posture of this petition for review in an effort to convince the Court that it does not have jurisdiction to review this case. The Court's examination of the merits of the petition should not be obscured by the respondents' smokescreens. The Supreme Judicial Court's misguided decision in this case represents a

final judgment that this Court has both jurisdiction and reason to review.[1]

I. THE SUPREME JUDICIAL COURT'S DECISION IS FINAL FOR PURPOSES OF REVIEW BY CERTIORARI.

The decision of the Supreme Judicial Court ("S.J.C.") is a final decision within the meaning of 28 U.S.C. § 1257. Section 1257 allows this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution." For purposes of this statute, a final judgment is one that is not subject to further review or correction in any other state tribunal and represents "the final word of a final court." *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945).

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[1] The respondents attempt to confuse this Court by describing as a "related lawsuit" an entirely inapposite Massachusetts trial court decision. The uncontroverted record in the Supreme Judicial Court showed that the decision in *Commonwealth* v. *Clark*, 8 Mass. L. Rptr. 97, 102 (April 6, 1998), was on motions to dismiss pending *criminal indictments* by prisoners who claimed that a disciplinary sentence to the DDU as a result of prison misconduct would bar a later criminal prosecution for the same misconduct on the basis of double jeopardy. No party presented (or could have presented) in their criminal prosecutions claims under the Eighth Amendment that the conditions of confinement in the DDU are themselves unconstitutional. The Department of Correction did not argue, and the Supreme Judicial Court did not hold, that the trial court decision in *Clark* should have any impact on the disposition of this case.

A. The Judgment At Issue Is Final And Not Subject To Further Review In State Court.

There is no question under Massachusetts law that a judgment entered under Mass. R. Civ. P. 54(b), like a judgment entered under the parallel provision of the Federal Rules, is a final judgment for all purposes and, as such, was subject to review on appeal by the Supreme Judicial Court. *See Gibbs Ford, Inc.* v. *United Truck Leasing Corporation*, 399 Mass. 8, 11, 502 N.E.2d 508, 510 (1987). As respondents concede (at 1 n.1), the trial court made the specific determinations required by Rule 54(b), and directed the entry of final judgment with regard to the claims asserted in Count I that respondents violated the Eighth Amendment by deliberately creating an environment of sensory deprivation that they knew was likely to cause harm to DDU inmates. App. A84-85. The respondents have never contended that the state's highest court lacked jurisdiction to hear the appeal or that further review of the S.J.C's decision is available in a state tribunal.

B. The Petitioners Will Not Have Any Opportunity To Press Their Eighth Amendment Claims If Certiorari Is Denied.

In affirming the trial court's judgment, the S.J.C. categorically rejected the petitioners' claims under the Eighth Amendment that the conditions of confinement in the DDU pose an intolerable risk of serious psychological harm. App. A4-6. The S.J.C. did not differentiate in any way between "systemic" or "individual" proof or preserve the rights of any of the petitioners to pursue injunctive or declaratory relief on these critical claims. Given the S.J.C.'s decision that, as a matter of law, the risk of psychological harm created by the conditions of DDU confinement does

not violate the Eighth Amendment, the trial court would never entertain claims by individual petitioners that they are entitled to Eighth Amendment relief from the intolerable conditions of confinement in the DDU or that the operation of the DDU must be altered to meet constitutional requirements. The respondents would surely argue that any Eighth Amendment claims of that kind are barred by the S.J.C.'s decision. This Court should not indulge the respondents' attempt to place petitioners in the untenable position of being unable to obtain review now because of misplaced finality concerns and later being unable to obtain review after all other claims are tried because the time in which to seek review of the S.J.C.'s decision has lapsed.

II. THIS CASE PRESENTS ISSUES WORTHY OF REVIEW.

The S.J.C.'s decision is in direct conflict with *Helling* v. *McKinney*, 509 U.S. 25 (1993), which held that factual disputes about whether prison conditions pose a substantial risk of serious harm must be resolved before a court can determine as a matter of law whether Eighth Amendment rights have been violated. *See* Pet. at 10-11. The respondents' argument that the Eighth Amendment approach to individual claims articulated in *Helling* somehow does not apply to systemic claims is not supported by any reasoned analysis or precedent.[2]

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[2] The respondents' characterization of the petitioners' claims as a "facial," rather than "as-applied," attack on the DDU, like their purported distinction between "individual" and "systemic" claims, is meaningless because petitioners challenge the conditions under which they are actually confined.

In *Helling*, the Court reversed the dismissal of a claim involving exposure to second-hand tobacco smoke because it found that it was "premature" to rule as a matter of law that the risk of harm was not sufficiently grave to implicate a "serious medical need" or that forced exposure to second-hand smoke is consistent with "current standards of decency." *Id.* at 34. The essence of *Helling* is that the magnitude of the risk must be resolved as a matter of fact *before* a court can properly judge as a matter of law whether it can be tolerated under the Eighth Amendment. This fundamental principle has nothing to do with whether claims are asserted on an individual or systemic basis.[3] In the face of petitioners' expert testimony underscoring the gravity of the risk presented by long-term confinement in the DDU, the S.J.C.'s determination that the risk of psychological harm posed by DDU conditions did not, as a matter of law, violate the Eighth Amendment cannot be reconciled with the holding in *Helling*.

Neither *Turner* v. *Safley*, 482 U.S. 78 (1987), nor *Procunier* v. *Martinez*, 416 U.S. 396 (1974), involved Eighth Amendment claims. There is no basis for the respondents'

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[3] Neither *Lewis* v. *Casey*, 518 U.S. 343 (1996), nor *Canton* v. *Harris*, 489 U.S. 378 (1989), suggests, much less holds, that the *Helling* standard does not apply to Eighth Amendment claims seeking prospective injunctive relief to prevent harm from occurring as a result of intolerable conditions of confinement. *Lewis* merely stands for the proposition that the scope of injunctive relief should be tailored to the extent of the established violation. *Canton* deals with the standards for imposing liability on a municipality for inadequate training of police officers. This case does not involve negligent administration of an otherwise sound prison program. The Eighth Amendment claim here challenges the intentionally punitive conditions of confinement in the DDU.

assertion that the problems of dealing with difficult prisoners somehow immunize their administration of the DDU from meaningful review under the Eighth Amendment. *Farmer* v. *Brennan*, 511 U.S. 825 (1994), reaffirms that *all* inmates have a right to seek relief under the Eighth Amendment when their conditions of confinement pose an intolerable risk of serious harm. The S.J.C.'s decision — that a court can determine, as a matter of law, that the risk to inmates in "supermax" prisons is acceptable without ever considering their proof that serious psychological harm has been and will continue to be caused by their conditions of confinement — presents an issue of national importance that should be reviewed by this Court.

CONCLUSION

For all the reasons offered here and in the petition, a writ of certiorari should issue.

Respectfully submitted,

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